IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 2002

LUCIOUS BROWN and HENRIETTA BROWN,

Appellants,

vs.

MIAMI-DADE COUNTY and GOLDEN GLADES MANAGEMENT CORP.,

Appellees.

CASE NO. 3D00-3540

LOWER TRIBUNAL NO. 00-14268

Opinion filed January 28, 2003.

An appeal from the Circuit Court for Dade County, Stuart M. Simons, Judge.

Barbara Green; Alan B. Saslaw; Clark, Robb, Mason & Coulombe and James K. Clark, for appellants.

Robert A. Ginsburg, Miami-Dade County Attorney and Stephen A. Stieglitz, Assistant County Attorney, for appellees.

Before SCHWARTZ, C.J., and JORGENSON, COPE, LEVY, GERSTEN, GODERICH, GREEN, FLETCHER, SHEVIN and RAMIREZ, JJ.

On Motion for Rehearing En Banc

PER CURIAM.

The motion for rehearing en banc is denied.

SCHWARTZ, C.J., and JORGENSON, GERSTEN, GREEN, FLETCHER,

and SHEVIN, JJ., concur.

COPE, J. (dissenting from denial of rehearing en banc).

It appears to me that the panel opinion is contrary to part II of Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So. 2d 912, 919-20 (Fla. 1985); Garcia v. Reyes, 697 So. 2d 549 (Fla. 4th DCA 1997); and Seguine v. City of Miami, 627 So. 2d 14 (Fla. 3d DCA 1993). Under Trianon, when and how to make an arrest is an immune function, lest legitimate law enforcement functions be chilled for fear of civil liability.

I.

The police department conducted a prostitution sting operation at a Howard Johnson Motel. The plaintiff was a guest. While returning to his room he came around a corner. A police officer yelled "Freeze," and pointed a gun at the plaintiff. The plaintiff lost his balance, fell down, and suffered an injury.

The plaintiff sued the County for negligence. The trial court dismissed the complaint on the theory that either the County owed no duty to the plaintiff, or alternatively, that the police activity was an immune discretionary function for purposes of sovereign immunity.

The panel has reversed. Respectfully, the immunity doctrine

is applicable here, and this court should affirm the dismissal.

As best I understand the plaintiff's position, it is that conducting a prostitution sting in a hotel creates a known dangerous condition on the premises and that the police had to issue some sort of general warning before conducting the sting. See Opinion at 4.

If I am reading this correctly, the plaintiff is saying that while doing a sting operation the police must set up some sort of perimeter around the hotel, presumably with barricades and yellow crime scene tape, before conducting the sting operation.

The essence of a sting operation, of course, is that it be kept secret from the target of the sting. The determination how to conduct the sting is pivotal to its success. The idea that there should be warnings posted, flyers distributed, barricades erected, and the like would defeat the police ability to conduct sting operations at all.

Ironically, the police officer in this case **did** warn the plaintiff to stay away from where the undercover operation was going on. What the plaintiff is really complaining about is not that there was a failure to warn--he was warned--but that the police officer startled him by yelling " Freeze."

II.

The Florida Supreme Court in Trianon Park said:

> **How** a governmental entity, through its officials and employees, exercises its discretionary power to enforce compliance with the laws duly enacted by a governmental body is a matter of governance, for which there never has been a common law duty of care. This discretionary power to enforce compliance with the law, as well as the authority to protect the public safety, is most notably reflected in the discretionary power given to judges, prosecutors, arresting officers, and other law enforcement officials. . . .

468 So. 2d at 919 (emphasis added).

The Fourth District has addressed sting operations in Garcia v. Reyes, 697 So. 2d 549 (Fla. 4th DCA 1997). Mr. Garcia had been the subject of a reverse sting operation in which it was found he had been entrapped. Garcia v. State, 582 So. 2d 88 (Fla. 4th DCA 1991). He sued for damages because he had been in prison for thirty months before being freed. 697 So. 2d at 549-50.

Relying on Trianon, the Fourth District ruled that there was no cause of action and that the claim was barred by sovereign immunity. Id. at 550-51 (citations and footnote omitted). The Fourth District concluded that immunity barred the claim, even though the police officers had used impermissible means in carrying out the sting operation.

In Everton v. Willard, 468 So. 2d 936 (Fla. 1985), the Florida Supreme Court said:

> Our decision in this case is consistent with our holding in Wong v. City of Miami, 237 So. 2d 132 (Fla. 1970), in which we held that a governmental entity could not be held liable for damage caused during a riot, regardless of the fact that the city had removed police officers dispatched to guard against the damage. In that case we stated that **the determination of strategy and tactics for the deployment of police powers was inherent in the right to exercise those powers**. Id. at 134. We concluded by noting that "**sovereign authorities ought to be left free to exercise their discretion and choose the tactics deemed appropriate without worry over possible allegations of negligence.**" Id. We reaffirmed that principle in our decision in Commercial Carrier, 371 So. 2d at 1019-20.

468 So. 2d at 939 (emphasis added).

III.

The panel opinion relies on seven cases for reversal. Opinion at 9. However, those cases all fall within several recognized exceptions to the discretionary immunity doctrine.

The panel relies heavily on Henderson v. Bowden, 737 So. 2d 532 (Fla. 1999), but it appears to me that the panel has misapprehended the rule set forth in that case. In Henderson, the police stopped a drunk driver. It was alleged that after arresting the driver, the police allowed an intoxicated passenger to drive the vehicle to a nearby Circle K convenience store and call his parents for a ride home. This individual drove the car away, crashed into trees, and two other passengers were killed.

The Henderson decision acknowledges that **"the decision of whether to enforce the law by making an arrest is a basic judgmental or discretionary governmental function that is immune from suit."** Id. at 537 (emphasis added; citation omitted).

The important point about Henderson is this. Once the intoxicated driver was arrested, the discretionary when-and-how-to-arrest function had been completed. It then became an **operational** decision what to do with the vehicle and the passengers. The teaching of Henderson is, very simply, that once the DUI arrest has been made, the officers must use due care in the disposition of the motor vehicle and the passengers. In making this post-arrest operational decision, the officers are not allowed to relinquish the motor vehicle to a passenger to drive away, if the officers know, or in the exercise of due care, should know, that the passenger is intoxicated.

Applying Henderson to the case now before us, the undercover officers were engaged in trying to accomplish an undercover arrest. The officer who encountered the plaintiff was trying–-albeit abruptly and rudely--to keep hotel guests out of the area where the undercover operation was taking place. These activities were part of the discretionary function leading up to the making of the undercover arrest, and qualify for exemption

under the sovereign immunity doctrine.

The panel relied on City of Pinellas Park v. Brown, 604 So. 2d 1222 (Fla. 1992), but it too is inapplicable. That was a high speed automobile chase which began when the offender ran a red light. The court held that the police must exercise due care when conducting a high speed motor vehicle chase on a public thoroughfare. Id. at 1225.

This result follows directly from Trianon itself, which says:

> The lack of a common law duty for exercising a discretionary police power function must, however, be distinguished from existing common law duties of care applicable to the same officials or employees in the **operation of motor vehicles** or the handling of firearms during the course of their employment to enforce compliance with the law.

Trianon, 468 So. 2d at 920 (emphasis added).[1] The City of Pinellas Park case is a simple application, or extension, of the motor vehicle rule already established in Trianon.

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[1] The quoted passage states that there is a common law duty of care in the handling of firearms during the course of police work. The "handling of firearms" presumably refers to situations in which a firearm is discharged, thus causing injury.

The plaintiff in this case has not argued that the "handling of firearms" exception in Trianon applies here, and rightly so. The firearm in this case was not fired.

The panel opinion relied on City of Miami v. Hong-De La Cruz, 784 So. 2d 475 (Fla. 3d DCA 2001), which reasoned that City of Pinellas Park should apply to a foot chase. The panel's thought process was that if a police officer must use due care in operating a motor vehicle during a high speed automobile chase, then logically the police officer must use due care in a foot chase of a fleeing suspect. The Hong-De La Cruz foot chase has no discernible application to the making of an undercover arrest.

The panel opinion cites Sams v. Oelrich, 717 So. 2d 1044 (Fla. 1st DCA 1998), but that case also involves an operational (not a discretionary) function. In Sams, the police had taken an inmate into custody after he had attempted an escape. Since the prisoner had been injured, the police took him to an emergency room at the local hospital. The officer failed to supervise the prisoner, who again escaped, ran for the exit, and struck Ms. Sams and her children, injuring them. Liability attached because the sheriff had operational responsibility to maintain control over his prisoner. Id. at 1048. The sheriff was deemed to have a special relationship and owe a duty to the others who were in the emergency room, who might be harmed if the prisoner again attempted an escape. This, too, is a case of

post-arrest operational responsibility.

The panel opinion relies on State Department of Highway Safety v. Kropff, 491 So. 2d 1252 (Fla. 3d DCA 1986). The law enforcement officer took charge of the scene of an auto accident in the nighttime, but did so negligently. An approaching vehicle struck the plaintiff. There was no sovereign immunity because the officer's "actions in securing the scene were operational in nature . . . ." Id. at 1255.

The panel opinion relies on Weissberg v. City of Miami Beach, 383 So. 2d 1158 (Fla. 3d DCA 1980), another traffic case. An off-duty police officer was assigned to direct traffic while a telephone repair crew obtained access to telephone cables through a manhole located in a city intersection. The officer left his post and there was a collision in the intersection. Directing traffic was held to be an operational level activity, for which there was no sovereign immunity. Id. at 1159.

By contrast, the decision in Seguine v. City of Miami, 627 So. 2d 14 (Fla. 3d DCA 1993) is similar to the present case, and supports the proposition that discretionary acts immunity applies here. In Seguine the police set out to arrest a mentally disturbed arrestee. When the police attempted the arrest, the arrestee jumped into a canal and drowned.

This court concluded that the decision how to make the arrest was a discretionary police function:

> We think it best that such delicate law enforcement decisions be left to the discretionary judgment of the police without entangling the courts through our tort law in such fundamental law enforcement policies--even where, as here, that judgment might in hindsight be arguably faulted either in whole or in part. Stated differently, the courts, through our tort law, ought not be involved in second-guessing the police as to how best to effect the arrest of an allegedly suicidal or mentally disturbed suspect; such a decision--even if arguably subject to possible criticism after the fact, as the plaintiff has done in this case--is best left to the political process to sort out, rather than entangling the courts in such fundamental law enforcement policies and thereby exposing the governmental entity involved to excessive tort liability.

Id. at 19.

Writing about an undercover operation, the federal Eighth Circuit said:

> An undercover operation constitutes a "permissible means of investigation." United States v. Russell, 411 U.S. 423, 432, 93 S. Ct. 1637, 1643, 36 L. Ed. 366 (1973). Because secrecy was an integral part of the undercover operation in this case, the FBI did not notify interested persons who might have jeopardized that operation with their knowledge. See Powers v. Lightner, 820 F. 2d 818, 822 (7th Cir. 1987) (Pell, J., concurring) ("[T]he Government's role * * * in the undercover operation * * * had to be kept absolutely secret to preserve the sting's success.") Here, in developing a strategy to apprehend the retaggers, the FBI had to weigh the public concern for reducing widespread criminal activity against the harm to innocent victims resulting from a covert operation. See id. at 822. The FBI's decision to maintain

> secrecy thus involved the balancing of policy considerations protected by the discretionary function exception.

Georgia Casualty and Surety Co. v. United States, 823 F. 2d 260, 263 (8th Cir. 1987) (citation omitted).

IV.

Making arrests is a core function of law enforcement. Generally speaking, law enforcement must make arrests when, and where, the arrestee can be found.

In conducting undercover operations, law enforcement can sometimes engage in advance planning, but the decision where and how to do an undercover operation is still largely constrained by the target. If the goal is to arrest persons who are engaged in prostitution in a particular hotel, then the undercover operation will need to be located in that hotel. If the target is hand-to-hand sales of narcotics, then the undercover operation must take place where those sales are conducted. If the target is someone engaged in selling large amounts of narcotics, the undercover transaction can be accomplished only where the target is willing to appear and deal.

The idea of the law enforcement exemption in this context is a sound one. Under this court's decision in Seguine, the Fourth District's decision in Garcia, and the Florida Supreme

Court's decisions in Everton and Trianon, the police selection of methods for carrying out an undercover sting operation fall into the immunity for discretionary acts.

For the stated reasons, I dissent from the denial of rehearing en banc.

LEVY, GODERICH and RAMIREZ, JJ., concur.